

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 10 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

DONALD D. BAILEY,	)	2 CA-CV 2011-0161
	)	DEPARTMENT B
Plaintiff/Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
JON D. HERMANSON; RAUCH,	)	Appellate Procedure
HERMANSON & EVERROAD, LTD.,	)	
	)	
Defendants/Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20111978

Honorable Scott Rash, Judge

DISMISSED

Donald D. Bailey

Tucson  
In Propria Persona

The Sorenson Law Firm, LLC  
By Jay C. Jacobson

Tempe  
Attorneys for Defendants/Appellees

K E L L Y, Judge.

¶1 Appellant Donald Bailey appeals the trial court's dismissal of his complaint against appellees Jon Hermanson and Rauch, Hermanson & Everroad, Ltd. On appeal,

Bailey asserts the court erred in finding that his action was barred due to res judicata. He also challenges the award of attorney fees. Because we lack jurisdiction, we dismiss his appeal.

¶2 The relevant facts are undisputed. In 2007, Hermanson provided expert testimony for Bailey in a lawsuit Bailey had filed against the Internal Revenue Service. In 2011, Bailey sued appellees alleging negligence. Appellees moved to dismiss on the grounds that the action was barred by res judicata and the statute of limitations, and the trial court granted the motion dismissing the case with prejudice.

¶3 Because we have an independent duty to determine whether we have jurisdiction over an appeal, *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997), we first must address whether the appellant's notice of appeal properly vested jurisdiction in this court to review the final judgment. Bailey's notice of appeal states:

Here Comes, Donald D. Bailey with their Notice of Appeal to the entitled Case No. 20111978. . . . Plaintiff Donald D. Bailey files his Notice of Appeal under Rule 8 Arizona Rule of Civil Appellate Procedure that they are going to Appeal their Superior Case No. 2011-1978 to Arizona Court of Appeals Division Two, 400 W. Congress, Tucson, Arizona 85701.

¶4 Rule 8(c), Ariz. R. Civ. App. P., requires, inter alia, that the notice of appeal “designate the judgment . . . appealed from.” This court does not acquire jurisdiction to review matters not identified in the notice. *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 561, 578 P.2d 985, 990 (1978); *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997,

1003 (App. 1982). We may construe a notice of appeal liberally, *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 30, 972 P.2d 676, 683 (App. 1998), and technical defects such as incorrect dates are not fatal to the appeal, *see, e.g., Hanen v. Willis*, 102 Ariz. 6, 9-10, 423 P.2d 95, 98-99 (1967) (finding jurisdiction despite notice of appeal citing date of minute entry rather than date final judgment entered); *Udy v. Calvary Corp.*, 162 Ariz. 7, 10-11, 780 P.2d 1055, 1058-59 (App. 1989) (notice of appeal naming only parents, not son on whose behalf suit was brought, simple technical defect and did not preclude appeal on his behalf). But we cannot disregard the plain requirements of Rule 8(c) and infer from the notice something that is not actually there. *Baker v. Emmerson*, 153 Ariz. 4, 8, 734 P.2d 101, 105 (App. 1986) (original notice of appeal from earlier judgment that failed to dispose of claim against a party insufficient to appeal from amended judgment adding the party). And Bailey's notice of appeal does not identify the judgment from which he seeks relief. Therefore, we do not have jurisdiction over this appeal.

¶5 Moreover, even assuming, without deciding, that Bailey's claim had not accrued until he filed the first complaint about these events, this action was barred by the statute of limitations because it was filed more than two years after the latest-possible accrual date—and more than three years after the alleged negligence. *See CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, ¶¶ 6-7, 7 P.3d 979, 981-82 (App. 2000) (two-year statute of limitations in professional negligence case begins to run upon accrual).

¶6 Citing A.R.S. § 12-349, appellees request attorney fees on appeal. In our discretion, we grant their request and award reasonable attorney fees because we agree Bailey brought this appeal “without substantial justification,”<sup>1</sup> pursuant to § 12-349(A)(1), (F).

¶7 Bailey’s appeal is dismissed for lack of jurisdiction.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

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<sup>1</sup>In addition to the aforementioned deficiencies, this is the fourth complaint that Bailey has filed as a result of the same alleged negligence. Two of the earlier cases were dismissed, one with prejudice. Another ended in an appeal in which this court affirmed summary judgment in favor of appellees. *Bailey v. Hermanson*, No. 2 CA-CV 2011-0034 (memorandum decision filed Jan. 5, 2012).